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In the Supreme Court of the United States

OCTOBER TERM, 1929

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

WILLINGHAM LOAN AND TRUST COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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PETITION

The Attorney General on behalf of the Commissioner of Internal Revenue prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above cause on November 22, 1929, reversing the decision of the United States Board of Tax Appeals. (R. 15.)

STATEMENT

The question in the case is whether the assessments on March 15, 1926, of additional income and profits taxes for the fiscal years ended May 31, 1920,

and May 31, 1921, were made within five years and four years, respectively, from the filing of the returns on March 15, 1921, and March 15, 1922, respectively.

The pertinent facts as found by the Board of Tax Appeals are as follows (R. 11, 12):

The taxpayer closed its books of account annually as of May 31, but made its income and profits tax returns on the basis of the calendar year. The return for the calendar year 1919 was filed with the collector on March 13, 1920; the return for 1920 was filed on March 15, 1921; and the return for 1921 was filed on March 15, 1922. Upon examination and audit the Commissioner held that the returns should not be filed upon the calendar year basis but upon the basis which the taxpayer used in keeping its books. Accordingly in 1924 the Commissioner required the taxpayer to file amended returns upon the fiscal year basis for the years ended May 31, 1920, and May 31, 1921. On March 15, 1926, the Commissioner made jeopardy assessments of additional income and profits taxes for said fiscal years 1920 and 1921. The taxpayer appealed to the Board of Tax Appeals and then to the Circuit Court of Appeals for the Fifth Circuit. Both held that the period of limitations did not begin to run until the filing of the last calendar year return embracing a portion of the particular fiscal year. But the Circuit Court of Appeals held that in computing the period of limitation the day of the filing of the return should be included, and reversed on the

ground that the assessment was made one day late because in computing the period the Commissioner had excluded the day of the filing of the return.

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in holding that in computing the period of limitation provided in Section 250 (d) of the Revenue Acts of 1918 and 1921 and Section 277 (a) (2) (3) of the Revenue Act of 1926, within which assessment of taxes must be made, the day of the filing of the tax return should be included.

REASONS FOR GRANTING THE WRIT

(1) The decision of the Circuit Court of Appeals is contrary to the decisions of this Court in *Sheets* v. *Selden's Lessee,* 2 Wall. 177; *Dutcher* v. *Wright,* 94 U. S. 553; and *Smith* v. *Gale,* 137 U. S. 577, in which cases this Court has laid down the principle that in computing periods of time for the performance of an act, whether started from an event or from a specified day, the day of the event or the day named shall be excluded from the computation.

(2) The decision of the Circuit Court of Appeals is also in conflict with the decision of the Circuit Court of Appeals for the First Circuit in *Eliot Nat. Bank* v. *Gill,* 218 Fed. 600, the Circuit Court of Appeals for the Second Circuit in *Siegelschiffer* v. *Penn Mut. Life Ins. Co.,* 248 Fed. 226, and the Circuit Court of Appeals for the Seventh Circuit in *In re Hamilton,* 29 F. (2d) 281.

(3) The question is one of importance in administering the tax laws. A large number of assessments involving large sums of money have been made by the Commissioner on the last day of the period allowed by the various Revenue Acts for the assessment of taxes, upon the assumption that the day of filing a return was excluded from the computation of the period and that the assessments were on time. Under the decision below all of these assessments would be barred.

(4) If the decision of the Circuit Court of Appeals is allowed to stand, the same rule would seem to apply to the computation of the period of time allowed by the statutes within which the Commissioner is authorized to allow credits and refunds of overassessments of taxes. (Section 252 of the Revenue Acts of 1918 and 1921, Section 281 of the Revenue Act of 1924, and Section 284 of the Revenue Act of 1926.) As a large number of credits and refunds have been allowed by the Commissioner on the last day of the period allowed by the statute, excluding the day of payment, it would follow, if the court in the instant case is correct, that large sums of money have been and are being erroneously credited or refunded by the Government.

(5) Numerous appeals to the Board of Tax Appeals involving large amounts in taxes have been filed by taxpayers under the provisions of Section 274 (a) of the Revenue Acts of 1924 and 1926 on the sixtieth day after the mailing by the Commissioner of notice of deficiency, upon the assumption

that the day of mailing the notice is excluded from the computation of the sixty-day period allowed by the statute for such an appeal. If the opinion of the Circuit Court of Appeals is allowed to stand, it would seem that the same rule of computation would apply to Section 274 (a), *supra,* and, as a consequence, the Board of Tax Appeals would be without jurisdiction to entertain a very large number of appeals that are now pending.

(6) The present decision leaves in confusion the proper rule to be applied in computing the periods of limitations provided in the various sections above referred to, and a decision by this Court seems necessary to enable the Treasury Department to properly administer the revenue laws.

Wherefore, it is respectfully submitted that the petition should be granted.

WILLIAM D. MITCHELL,
Attorney General.

FEBRUARY, 1930.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals is reported in 36 F. (2d) 49.

The findings of fact and opinion of the Board of Tax Appeals (R. 11–15), are reported in 15 B. T. A. 931.

JURISDICTION

The order of the Circuit Court of Appeals reversing the decision of the Board of Tax Appeals was entered on November 22, 1929. Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Where the statute requires that the assessment of taxes for the fiscal year 1920 shall be made within five years from the time the return was due or made, and for the fiscal year 1921 within four years from the filing of the return, and the returns were filed on March 15, 1921, and March 15, 1922, respectively, are assessments on March 15, 1926, for taxes for each fiscal year made within the respective periods of five and four years prescribed?

STATUTES INVOLVED

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1083:

> SEC. 250. (d) Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. In the case of such false or fraudulent returns, the amount of tax due may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due.

Revenue Act of 1921, c. 136, 42 Stat. 227, 265:

> SEC. 250. (d) The amount of income, excess profits, or war profits taxes due under any return made under this Act for the taxable year 1921 * * * shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess profits, or war profits tax Acts * * * shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such

taxes due under this Act or under prior income, excess profits, or war profits tax Acts * * * shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act * * *.

Revenue Act of 1926, c. 27, 44 Stat. 9, 58:

SEC. 277. (a) Except as provided in section 278—

* * * * *

(2) The amount of income, excess profits, and war profits taxes imposed by the Revenue Act of 1921, and by such Act as amended, for the taxable year 1921 and succeeding taxable years, and the amount of income taxes imposed by the Revenue Act of 1924, shall be assessed within four years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

(3) The amount of income, excess profits, and war profits taxes imposed by * * * the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period. (U. S. C. App., Title 26, Sec. 1057.)

STATEMENT

A statement of the facts and of the error relied upon will be found in the petition.

ARGUMENT

The pertinent provisions of the three statutes of limitation here involved are in almost exactly the same language and provide that the amount of tax due under any return shall be determined and assessed by the Commissioner within a specified number of years after the return was filed. The Circuit Court of Appeals for the Fifth Circuit in this case has interpreted that language to mean that in computing the period the day of the filing of the return must be included. Here a return to which the five-year statute applied was filed March 15, 1921, and a return to which the four-year statute applied was filed March 15, 1922, and the assessment as to both returns was made March 15, 1926. The court held that the assessment was one day late. In doing so it said it was following its own decision in *New York Life Ins. Co.* v. *Bullock,* 26 F. (2d) 666, where it had approved a rule with regard to computation of time, that, where it is to be made from a specified day, the first day is excluded, but where it runs from an event the first day is to be included. This distinction was applied in some of the earlier cases but it has been rejected by the later authorities as unsound. The general rule now favored and well established in most, if not all, jurisdictions, is that in computing the period of time, whether started from an event or a specified day, the first day or *terminus a quo* is excluded. *Sheets* v. *Selden's Lessee,* 2 Wall. 177; *Dutcher* v.

Wright, 94 U. S. 553; *Smith* v. *Gale,* 137 U. S. 577; *Eliot Nat. Bank* v. *Gill,* 218 Fed. 600; *Siegelschiffer* v. *Penn Mut. Life Ins. Co.,* 248 Fed. 226; *Bennis* v. *Leonard,* 118 Mass. 502; *Seward* v. *Hayden,* 150 Mass. 158; *McCulloch* v. *Hopper,* 47 N. J. L. 189; *Cornell* v. *Moulton,* 3 Denio (N. Y.) 12.

In *Sheets* v. *Selden's Lessee, supra,* this Court held that under a lease requiring payment of rental within one month from the due date thereof the month period for the payment of installment due on May 1st expired on June 1st next following. It was there said (p. 190):

> The rent becoming due on the first day of May, the one month from that time within which the payment was required to be made to prevent a forfeiture, expired on the first day of June following. In the computation of the time, the day upon which the rent became due was to be excluded. The general current of the modern authorities on the interpretation of contracts, and also statutes, where time is to be computed from a particular day or a particular event, as when an act is to be performed within a specified period *from* or *after* a day named, is to exclude the day thus designated, and to include the last day of the specified period. "When the period allowed for doing an act," says Mr. Chief Justice Bronson, "is to be reckoned from the making of a contract, or the happening of any other event, the day on which the event happened may be regarded

> as an entirety or a point of time; and so be excluded from the computation."

To the same effect see *Smith* v. *Gale, supra.*

In *Dutcher* v. *Wright, supra,* this Court applied the same rule of computation to the construction of the Bankruptcy Act. Although that Act prescribed a rule for computing periods of time thereunder, this Court did not predicate its decision solely upon the statutory rule, but referred to and applied the general rule under which the *terminus a quo* is excluded.

The Circuit Court of Appeals for the First, Second, and Seventh Circuits have likewise recognized this general rule and have ignored the distinction made by the Circuit Court of Appeals in the instant case. *Siegelschiffer* v. *Penn Mut. Life Ins. Co.,* 248 Fed. 226; *In re Hamilton,* 29 F. (2d) 281; *Eliot Nat. Bank* v. *Gill,* 218 Fed. 600.

Such cases as *Taylor* v. *Brown,* 147 U. S. 640; *Griffith v. Bogert,* 18 How. 158; *Arnold* v. *United States,* 9 Cranch 103; and *Board of Commissioners* v. *Vandriss,* 115 Fed. 866, are not inconsistent and do not establish any different rule. In these cases it was held that the manifest purpose and clear intent of the statutes was that the first day or *terminus a quo* should be included in the computation of the period. These decisions were not founded upon any such distinction as the Circuit Court of Appeals adopts in this case. There is nothing in the present case to justify the appli-

cation of the exception to the general rule which was applied in these cases. The sections of the Revenue Acts involved here are statutes of limitation and nothing therein indicates a Congressional intent to vary the general rule of computing periods of time. On the contrary, it seems clear that Congress intended to allow the Commissioner the full period specified within which to perform his official duty of assessing taxes and that intent would be frustrated under the rule for computing time which the Circuit Court of Appeals adopts in this case.

Moreover, the Circuit Court of Appeals has apparently misconceived the character of the statutes involved in this case, in referring to the rule of construction that taxing statutes are to be construed liberally in favor of the taxpayer. The sections of the laws in question, although a part of Revenue Acts imposing taxes, are statutes of limitation and are subject to all the rules of construction governing such statutes. It is well settled that statutes imposing limitations against the Government are strictly construed in favor of the Government (*Bowers* v. *N. Y. & Albany Co.*, 273 U. S. 346; *Du Pont de Nemours & Co.* v. *Davis*, 264 U. S. 456; *United States* v. *Whited & Wheless*, 246 U. S. 552; *United States* v. *Nashville, etc., Ry. Co.*, 118 U. S. 120), and the Circuit Court of Appeals erred in not recognizing and giving effect to this well and long established principle.

CONCLUSION

Because of the conflict of decisions and the resulting difficulty in a proper administration of the Revenue Acts, it is submitted that this petition should be granted.

Respectfully submitted.

WILLIAM D. MITCHELL,
Attorney General.
G. A. YOUNGQUIST,
Assistant Attorney General.
SEWALL KEY,
HARVEY R. GAMBLE,
Special Assistants to the Attorney General.
C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue,
JOHN M. HUDSON,
Special Attorney,
Bureau of Internal Revenue,
Of Counsel.

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